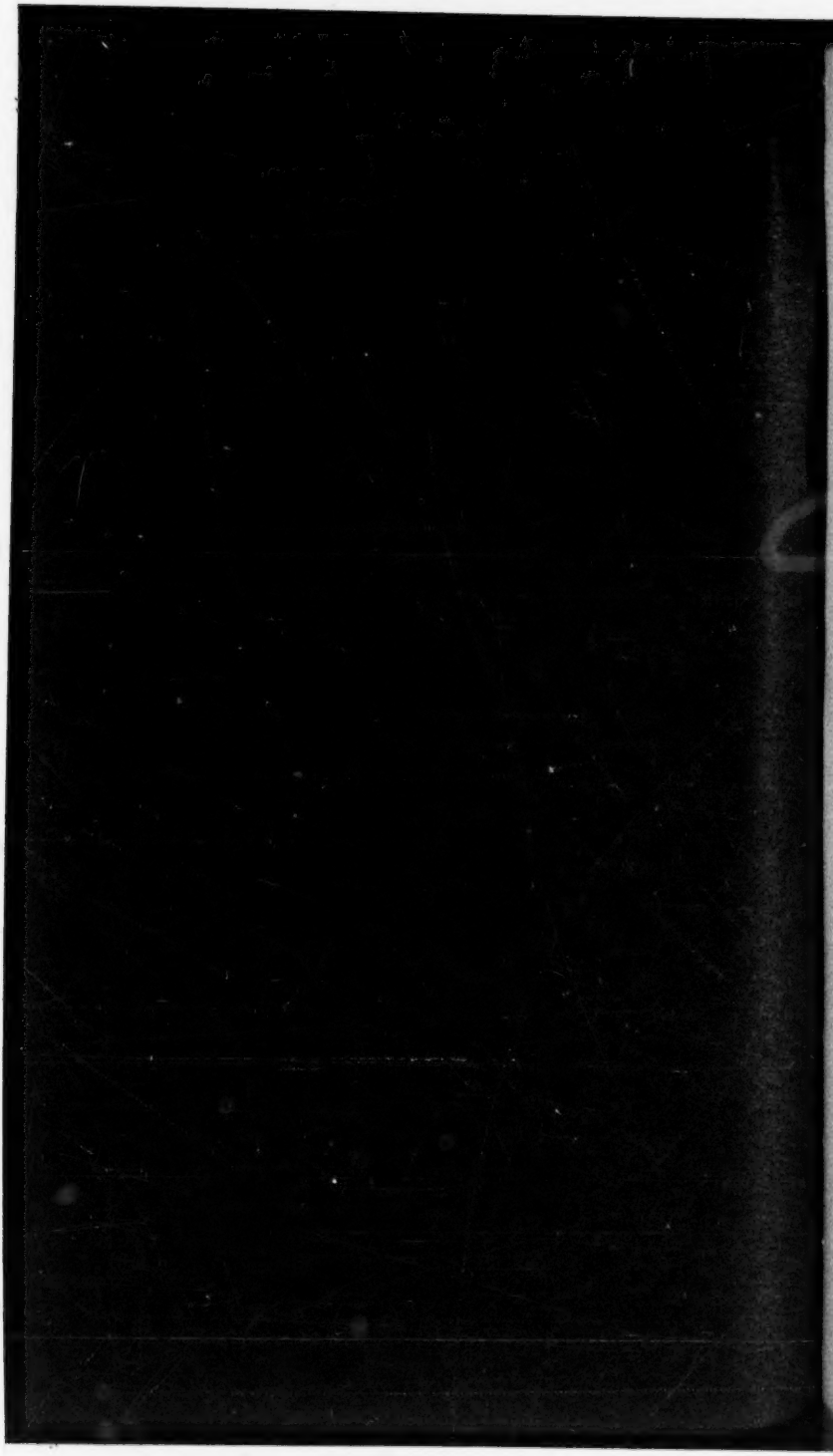


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. .....

THE LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, A CORPORATION, PETITIONER

v.

JAMES A. BEAR, TRUSTEE IN BANKRUPTCY of W. L. BECKER & COMPANY and ROANOKE PROVISION COMPANY, and W. L. BECKER, SR., and W. L. BECKER, JR., INDIVIDUALLY, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, The Liberty National Bank of Roanoke, Virginia, a corporation, respectfully petitions this Court for a writ of certiorari to require that there be certified to this court for review and determination the causes, the records of which remain in the United States Circuit Court of Appeals for the Fourth Circuit, being Numbers 2011 and 2016, the short style of each case being James A. Bear, Trustee for, etc. v. said Bank, wherein said Trustee was Petitioner and Appellant and said Bank was Respond-

ent and Appellee, a final decree having been entered on December 22nd, 1922, dismissing said Trustee's petition to Superintend and Revise, in Matter of Law, but reversing the decision of the District Court on the Petition for Appeal.

This is a Bankruptcy cause where the final decision of the Circuit Court of Appeals, in reversing the District Court, rejects the priority asserted by the Bank on its judgment against the individual estates of W. L. Becker, Sr., and Jr.; where the amount in controversy exceeds the sum of $2,000.00; and where the determination of the questions involved in the rejection of the priority claimed by the Bank on its judgment against the individual estates is essential to a uniform construction of the Bankruptcy Act throughout the United States.

A BRIEF STATEMENT OF THE MATTER INVOLVED

(a) W. L. Becker, Sr., and Jr., were the sole partners in the two partnerships of W. L. Becker & Company and the Roanoke Provision Company, merchandise brokers in the City of Roanoke, Virginia. These two partnerships committed an act of bankruptcy by making a general assignment of their partnership assets for the benefit of their partnership creditors, and Runkle & Company, and two other partnership creditors, filed an involuntary petition in bankruptcy against the two partnerships, **but the partners in their individual capacity were not made parties to said petition.**

(b) The two partnerships were adjudicated bankrupts on August 20th, 1920, the partnerships having answered said petition, waived process and admitted the act of bankruptcy.

The partners were not made parties defendant individually to the petition against the partnerships, **but the petition against the two partnerships prayed that the individual partners in their individual capacity,** might be

adjudicated bankrupts. The individuals had committed no act of bankruptcy; and the Court by its order in adjudicating the partnerships, expressly failed to declare the individuals composing the partnerships to be bankrupts; and this order of the court in so refusing to adjudicate the individuals to be bankrupts was never appealed from.

The record shows that there will be no surplus from the individual assets for partnership creditors, nor vice versa.

A receiver was appointed for the partnerships and directed to take charge of certain of the partnership assets, and the partnerships were directed to appear before the Referee, who entered an order requiring the two partnerships to file a list of partnership creditors and assets, and the partners to file a list of individual creditors and assets.

(c) On July 20th, 1920, said Bank recovered a judgment for $5,566.05, with interest, collection and attorneys fees and costs against said Roanoke Provision Company, a partnership, and also against W. L. Becker, Sr., and W. L. Becker, Jr., individually, on a negotiable note made jointly by W. L. Becker, Sr., and the Roanoke Provision Company and endorsed by W. L. Becker, Sr., and W. L. Becker, Jr., individually. The judgment was duly docketed according to the laws of Virginia, and became a lien on both partnership and individual real estate, and execution was issued and became a lien on partnership assets subject to levy, and on the individual personal property, including homestead, as the note waived the homestead.

(d) The partnerships purported to offer a composition to their partnership creditors, which was rejected by the District Court because the necessary deposit was not made. Among other things this printed offer of composition contained the following:

"No petition for bankruptcy has been filed by or against such individuals and no discharge of such individ-

ual debts so listed as individual debts is sought; aside, therefore, from the fact that this deed of trust securing the advancement of the money offered in this composition to the partnership creditors will be upon the security of the individual real estate assets, the rights of the individual creditors are not herein sought to be, and will not be, affected by this composition if affirmed."

On November 29th, 1920, **more than four months** after the recover of the Bank's judgment, the partnerships made an amended offer of composition, in which they said the money for the composition, offered solely to partnership creditors, was secured by putting a mortgage on the real estate of the individuals. The Bank objected to the composition because individual assets could not be mortgaged to pay partnership creditors. The District Court sustained the objection and refused the composition by its order of April 20th, 1921.

On April 27th, 1921, **more than nine months after the Bank had recovered its judgment against them,** W. L. Becker, Sr., and W. L. Becker, Jr., **as individuals,** filed their voluntary petitions in bankruptcy, with the required schedules, and on April 28th, 1921, they were adjudged to be bankrupts individually. James A. Bear was thereafter elected trustee of the partnerships by partnership creditors, and trustee of the individual estates of W. L. Becker, Sr., and W. L. Becker, Jr., by the individual creditors.

On May 31st, 1921, the Bank filed its two separate proofs of debt against W. L. Becker, Sr., individually, and against W. L. Becker, Jr., individually, having theretofore filed a separate and independent proof of debt in the bankruptcy proceedings of the partnerships, there being a separate petition and adjudication against the partnerships to which the individuals were not parties.

(e) The Bank alleged in its proofs of debt against the individuals, that its judgment having been recovered,

docketed and execution issued, more than four months before the individuals were adjudicated bankrupts, was a valid and subsisting lien on the individual assets of W. L. Becker, Sr., and W. L. Becker, Jr., and should be paid in full, and that the entire individual assets of both W. L. Becker, Sr. and Jr., would be required to pay individual debts, and that there would be no surplus of individual assets to be applied on partnership debts. The Trustee nowhere denies this allegation that there would be no surplus from the individual estates after paying individual debts.

(f) The trustee of the partnerships and the trustee of the separate estates filed before the Referee four objections to the Bank's debt being paid in full out of the individual assets of the individuals, who were not adjudicated bankrupts until more than nine months after the recovery of its judgment.

These four objections were as follows:

First: That the Bank's judgment against the individuals was dissolved and rendered null and void by the bankruptcy of the partnerships, though the individual partners were not parties to said petition against the partnerships.

Second: That by virtue of the qualification of the trustee of the partnerships, he became vested with the title to the individual estates on the date that the partnerships were adjudged bankrupt by relation back to said date.

Third: That the Bank's judgment against the individuals "only became four months old prior to the filing of the voluntary petition of said individuals, because litigation was pending over the offer of composition filed by the partnerships."

Fourth: That the Bank's debt in truth and in fact was a partnership debt.

The Referee sustained the first and second objections.

above, and refused to allow the Bank's judgment as a secured debt against the individual estates.

(g) The District Court, on the Petition of the Bank for an Appeal, and on its Petition for Review, reversed the Referee, and held that the Bank's judgment against the individual estates had not been nullified by the order adjudicating the firm a bankrupt, and that the court's order refusing to adjudicate the individuals along with the two partnerships was final.

(h) The cause was taken to the Circuit Court of Appeals by the Trustee on a Petition to Superintend and Revise, in Matter of Law, and on a Petition for Appeal. The Circuit Court dismissed the Trustee's Petition to Superintend and Revise, but sustained his Petition for Appeal, thus reversing the District Court, and entered a final decree on December 22nd, 1922, refusing to allow the priority claimed by the Bank on its judgment against the individual estates.

GENERAL REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Your Petitioner is advised that said final decree of the Circuit Court of Appeals, is erroneous and contrary to and in conflict with the Bankruptcy Act, growing out of a misconstruction and misapplication of the decisions of this court.

The reasons relied upon by your Petitioner for the issuance of said writ and for the granting of its petition may be summarized as follows:

(1) The learned Judges of the Circuit Court of Appeals erred in holding that the bankruptcy of the two partnerships carried with it the bankruptcy of the individual partners, when they were not parties to the partnership petition, when the individual partners had committed no act of bankruptcy, and when more than four months after

the adjudication of the partnerships the individuals were adjudicated bankrupts on their voluntary petition.

(2) Said court erred in holding that the bankruptcy of the partnerships, for making a general assignment, ipso facto dissolved the Bank's judgment against the individual estates.

(3) Said court erred in holding that the Bank's judgment against the individuals had been dissolved, when it was more than four months old, at the time said individuals were adjudicated bankrupt.

(4) Said court erred in holding that in the bankruptcy proceedings against the partnerships, it was legal for the Trustee to go against the individual assets of the partners, when all the individual assets were required for individual debts, without any surplus.

(5) Said court erred in assuming that the partnerships were insolvent, when there was no allegation or proof, that the individuals composing the partnerships were insolvent.

(6) Said court erred in not sustaining the Bank's demurrer and motion to dismiss the Trustee's petition.

(7) Said court erred in not sustaining the decision of the learned Judge of the District Court, when he held that his order refusing to adjudicate the individuals bankrupts, along with the partnerships, had to be appealed from within ten days, and "as no appeal was taken within the time allowed by law," neither his court, nor any other court, could now correct the supposed error.

What effect the bankruptcy of a partnership, to which proceedings the individual partners are not parties in their individual capacity, has upon a judgment against the individuals, who, after such judgment is four months old, become bankrupts on their voluntary petition, has never been passed upon, so far as we are advised, by this Honorable Court, and it is in the interest of jurisprudence and

uniformity of construction and application of the Bankruptcy Act, that this question be finally determined by this Court.

Your Petitioner presents, herewith, a certified copy of the entire record in said cause, and respectfully prays that a writ of certiorari be issued to the end that said cause may be reviewed and determined by this Honorable Court as provided for by law, and that the said decision of the United States Circuit Court of Appeals for the Fourth Circuit may be reversed, and that your Petitioner may have such other and further relief in the premises as to this court may seem just and proper.

THE LIBERTY NATIONAL BANK of Roanoke, Virginia, a Corporation.

By Its Counsel:

JAS. D. JOHNSTON.

STATE OF VIRGINIA, }
CITY OF ROANOKE, } To-Wit

Jas. D. Johnston, being duly sworn, deposes and says that he is the counsel for the above named Petitioner, and that the matters in the foregoing petition are true to the best of his knowledge, in formation and belief.

Subscribed and sworn to before me, this the 26th day of February, 1923.

Florence E. Lawson
Notary Public

[SEAL]

I do hereby certify that the foregoing petition is presented in good faith, and not for the purpose of delay, and that in my opinion the case is a proper one for the issuance of the writ of certiorari prayed for.

Jas. D. Johnston

Counsel For The Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. .....

THE LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, A CORPORATION, PETITIONER

v.

JAMES A. BEAR, TRUSTEE IN BANKRUPTCY of the Estates of W. L. BECKER, SR., and W. L. BECKER, JR., Partners Trading as W. L. BECKER & COMPANY, and as THE ROANOKE PROVISION COMPANY, and TRUSTEE IN BANKRUPTCY of the Individual Estates of W. L. BECKER, SR., and W. L. BECKER, JR., RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

We believe it will be conducive to clearness to refer throughout this brief, to the Petitioner as the Bank, and the Respondent as Trustee.

The petition, to which this brief is attached, contains a short statement of the facts, and by reference thereto it will be seen that the main issue is whether the bankruptcy

of the partnership, ipso facto, dissolved the Bank's judgment against the individual partners, who were not parties to the petition against the partnerships, and were not before the court.

The essential facts to be considered are the following:

1. That the act of bankruptcy was committed solely by the two partnerships; that the partners as individuals had committed no act of bankruptcy; that the act of bankruptcy by the partnerships was making a general assignment.

2. That upon an involuntary petition, alleging the making of a general assignment, the partnerships were adjudged bankrupts; that the individuals composing the partnerships were not parties to the petition against the partnerships, and no process was had on them as individuals, and they were not before the court. (Record page 29).

3. That while the act of bankruptcy was committed solely by the partnerships, and they alone were parties to the petition, in the prayer of this petition it was prayed that the individuals, as well as the partnerships, might be adjudicated bankrupt. The District Court struck out this portion of the prayer, refused to adjudicate the individuals bankrupts and no appeal was ever taken from this ruling. (Record page 67.)

4. That the Bank's judgment against the individuals was more than nine months old when they were adjudged bankrupts individually on their voluntary petition. The Bank's judgment having been recovered July 20, 1920, (pages 28 and 29 of record) and the individuals having been adjudged on April 28th, 1921, (see page 33, under Section 13 of record).

5. That the Trustee for the partnerships was elected solely by partnership creditors, and the Trustee for the individuals was elected solely by the individual creditors, (page 33, Sec. 14 of record).

6. That there was no surplus from the individual assets to be applied to partnership debts nor vice versa, (see record, page 34, Sec. 18).

7. That the sole object in putting the partnerships in bankruptcy was to apply the partnership assets to partnership debts. This is made very plain in the printed composition offered to partnership creditors, where it is stated that the individuals were not in bankruptcy, and that no discharge was sought from individual debts, (record, top of page 31).

8. That the making of the general assignment by the partnership was of itself an act of bankruptcy, and was an act of bankruptcy that did not involve insolvency. That the individual partners not being parties to the petition against the partnerships, there was of course no allegation of their individual insolvency. That the partnerships having made a general assignment, it was not necessary for the court to inquire into the solvency or insolvency of the partnerships, before adjudicating them bankrupts.

When the individuals on their voluntary petitions were adjudged bankrupts, the Bank filed its two separate proofs of debt alleging that its judgment against these parties, being more than four months old, was a secured debt and should be paid in full, and that it was in no way affected by the bankruptcy of the partnership. The two proofs of debt were the same, and, therefore, only one is printed in the record and begins on page 22.

The Trustee filed before the referee four objections to the allowance of the Bank's debt as a secured claim against the individual estates (record, pages 26-7-8).

The Referee refused to allow the Bank's judgment as a secured claim against the individual estates, but allowed it as an unsecured claim against the two individual estates, and also the partnership estate. (Page 58 of record).

The Bank assigned errors in the ruling of the Referee

(pages 65 and 66 of record) and petitioned the District Court for an appeal and for a review. (Record pages 59 to 65).

The learned Judge of the District Court, in an able opinion, reversed the ruling of the Referee and upheld the lien of the Bank against the individual estates. (Page 66 of record).

The Trustee assigned as errors in the opinion of the learned District Judge the same objections made before the Referee. (Record pages 70-72). The Trustee filed his petitions to Superintend and Revise, in Matter of Law, the proceedings of the District Court and for an Appeal. (Record pages 1-10 and 70-1-2).

The Bank filed to each of these petitions its motion to dismiss and to each its demurrer. (Record pages 11-15 and 76-80).

The learned Judges of the Circuit Court of Appeals dismissed the Trustee's petition to Superintend and Revise, but reversed the decision of the District Court on the Appeal. (Pages 82-85 of record).

A

ASSIGNMENT OF ERRORS AND ARGUMENT

First: The first error in the decision of the learned Judges of the Circuit Court was in holding that the bankruptcy of the partnerships carried with it the bankruptcy of the individual partners, when the partners as individuals were not parties to the petition or proceedings against the partnerships. This ruling will lead to confusion in the application of the bankruptcy act, and is contrary to the decisions of this court.

The court will bear in mind, that the two partnerships made a general assignment, and upon this ground alone, they were adjudged bankrupts. Now a general assignment does not imply or involve insolvency, as was decided in

Francis v. McNeal, 26 American Bankruptcy Reports, page 560, 186 Fed. 481, where the Circuit Court says:

> "The Burtenshaw case was not founded on insolvency of the partnership, or of its members. The act of bankruptcy there charged was an assignment by the partnership of its assets for the benefit of its creditors—**an act of bankruptcy that does not necessarily involve insolvency.**"

It is very apparent why a general assignment need not involve insolvency. A party might have assets many times his liabilities, and yet, for some good reason, find it necessary to make a general assignment which would be in itself an act of bankruptcy, for which he might be adjudged a bankrupt, though perfectly solvent.

The same court goes on to say on this same page, 560:

> "Whether, where the act of bankruptcy charged against a partnership is one that does not involve insolvency, an adjudication against the partnership only draws into the proceeding the individual assets of the unadjudicated members, may well be doubted. **That question, however, is not now before us.**"

This same case was affirmed by the Supreme Court, 30 A. B. R. 244, and we find nothing in the Court's opinion in conflict with the above quotations from the decision of the same case in the Circuit Court, and we conclude, therefore, that the case of Francis v. McNeal does not decide the point in the instant case, for the Circuit Court says that this question was not before the court, and the decision of the Supreme Court contains nothing to the contrary.

The decision of the Circuit Court in the instant case is based almost solely upon the decision of the Supreme Court in Francis v. McNeal, and relies upon this authority for its ruling that the bankruptcy of the partnership ipso facto carried with it the bankruptcy of the individuals,

when we have seen that the decision in Francis v. McNeal states that this question was not before it.

Again, the Circuit Court in Francis v. McNeal 26, A. B. R. page 558, uses this language:

> "A partnership cannot be adjudged a bankrupt, in an involuntary proceeding, unless it has committed an act of bankruptcy. If the act charged be one involving insolvency, since every partner is liable in solido for all the partnership debts, the adjudication against the partnership must be based on allegations and proofs that the assets of its members, in excess of their individual debts, plus the assets of the partnership, are insufficient to pay the partnership debts. Otherwise, there is no partnership insolvency, notwithstanding the entity doctrine."

Now, there can be no bankruptcy of a partnership for insolvency unless, as stated in the above authority, it is alleged and proven that the individuals, as well as the partnership, are insolvent. In such a case there can be no adjudication of the partnership without an adjudication of the individuals, and of course individuals cannot be adjudicated unless they are before the court, and they were not before the Court in the instant partnership case.

The Supreme Court says in Francis v. McNeal, 30 A B. R. 247:

> "If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, in an able opinion, Re Forbes (D. C. Mass) 11 A. B. R. 128 137) it is sufficient to answer that no such objection has been taken, but upon the contrary, Francis has consented and agreed to hand over his property according to the order of the Court."

Applying the above legal principle to the instant case, what is the proper conclusion to be reached? We conclude

that as the partnerships were declared bankrupts, without the partners being parties to said petition, that the District Court made no mistake, and that the general assignment of the partnerships did not involve insolvency, otherwise, the Court could not have adjudged the partnerships without the allegation and proof that the individuals were also insolvent.

We further conclude that there being no allegation or proof in the partnership proceedings of the insolvency of the individual partners, and they not being parties to such proceedings, that the Circuit Court could not properly hold, or even assume, insolvency of the partnerships and that it was fatal error upon such facts for it to decide that the bankruptcy of the partnerships carried with it the bankruptcy of the individuals.

(b) As the Circuit Court based its decision upon the case of Francis v. McNeal, it is essential that the court consider and contrast the difference between the facts of that case and the instant case.

In Francis v. McNeal "a creditors' petition was filed against the partnership and all its members, alleging that the individual respondents were partners in the said Provident Investment Bureau, that they were bankrupt individually and as a firm, and praying that they be adjudged to be bankrupt under the act of Congress." (26 A. B. R. 556).

In the instant case the petition was solely against the partnerships. The individuals were not parties defendant to the partnership petition, no process was had on them, and no answer filed by them. The partnerships assert in their composition offer that "no petition for bankruptcy has been filed by or against such individuals, and no discharge of such individual debts so listed as individual debts is sought." (Record page 31).

In Francis v. McNeal the partnership and two of its three members were adjudged bankrupts in one proceeding.

In the instant case the court refused in the proceedings against the partnerships, to adjudge the individuals bankrupts, and several months later the individuals on their voluntary petition were adjudged bankrupts.

In Francis v. McNeal there was no question involved as to the dissolution of a judgment; the sole question being whether the trustee could distribute individual assets, which were admitted to be partnership assets.

In the instant case the annullment of the Bank's judgment against the individuals is a vital issue.

In Francis v. McNeal there was a surplus from the individual assets to be applied on partnership debts and but one trustee.

In this case there was no surplus from the individual assets, and no occasion for the Trustee of the partnerships to assert any control over individual assets. Besides, the individuals were adjudicated on their separate voluntary petitions, and a trustee appointed by the individual creditors for the individual assets. The fact that the individual creditors by a separate and distinct vote named the same party as trustee that had been named by the partnership creditors, does not in the least change the situation.

From the above outline it may be seen that the decision of this court in Francis v. McNeal was based upon facts very different from the case at Bar, and that the Circuit Court erred in relying on said case when it held that the bankruptcy of the partnerships carried with it the bankruptcy of the individuals in the instant case, where the act of bankruptcy consisted in the partnerships making a general assignment.

(c) Notwithstanding our great respect for the learning of the Circuit Judges who decided this case, we feel constrained to point out in the opinion what seems conflicting. In the first part of the opinion the court assumes that the partnerships were insolvent, and reasons

"that insolvency of the partnership connotes insolvency of every member of it." In next to the last paragraph the court says: "The insolvency of the partnership at the date of the judgment seems to have been assumed in the court below. At any rate, no issue of solvency or insolvency at the date of the judgment appears to have been made. We express no opinion as to the existence of such insolvency or its effect."

We think we have pointed out clearly that the District Court was not called upon to assume insolvency, and we fail to find anything in the record that would justify the belief that the learned District Judge made any assumption of insolvency. It was not necessary for the adjudication of the partnerships, where there was a general assignment, that insolvency be assumed.

How the learned Circuit Court could decide this case as it did, and express "no opinion as to the existence of insolvency or its effect," we fail to understand. If we read the opinion correctly, it is based upon the insolvency of the partnerships, which it says the District Court must have assumed, and then proceeds to assume itself, that the individuals composing the partnerships were insolvent. Again, we fail to understand how the learned Judges of the Circuit Court could reach the decision they did on the appeal, basing their decision on the insolvency of the partnerships, when the individuals were not before the court, and when it was absolutely essential that it be alleged and proven that these individuals were insolvent as well as the partnerships.

How could the learned Judges of the Circuit Court assert that the learned Judge of the District Court must have assumed insolvency of the individuals (and there could have been no assumption of the insolvency of the partnerships without assuming the insolvency of the individuals), when the District Court stated in its opinion (page 68, record) that it had refused to adjudge the indi-

viduals composing the firm to be bankrupts, along with the partnerships; that no appeal was taken from this decision. and added, "The result is that the individuals composing the partnership have, in the partnership proceeding, never been adjudicated bankrupts."

Furthermore, it will be found on page 48 of the record, under "Agreed Statement of Facts From the Record," that the Bank, in its proof of debt filed against the partnerships, alleged "That W. L. Becker, Sr. and Jr., in their individual capacity are not bankrupts, and that no petition has been filed against them to have them adjudged bankrupt, and that as individuals they are not insolvent."

In the face of this emphatic allegation that the individuals were not insolvent, it would seem that the learned Judges of the Circuit Court of Appeals were in error when they state that "no issue of solvency or insolvency at the date of the judgment appears to have been made." Would it not have been more consonant with sound reasoning for the court to have held that as the Trustee failed to deny this allegation, that he was presumed to have admitted it?

B

THE TRUSTEE NEITHER ALLEGED NOR PROVED INSOLVENCY OF THE INDIVIDUAL PARTNERS, AND BOTH ARE ESSENTIAL TO DEFEAT BANK'S JUDGMENT

Second: The second error made by the learned Judges of the Circuit Court was in holding that the Bank's judgment against the individuals was ipso facto dissolved by the bankruptcy of the partnerships.

The learned Judge of the District Court says in his able opinion on page 68 of the record, that

> "Both the filing of a petition within four months and an adjudication thereon are necessary to nullify a lien of judgment. I read the pettiion which was filed

on August 6th, 1920, as praying only for an adjudication of the firm. But even if the petition be read as against both the firm and the persons composing it, still it was not, and never can be, followed by an adjudication against the individuals composing the firm. Hence the case is not within either sub section C. or sub section F. of Section 67, unless it be proper to say that an adjudication that a firm is a bankrupt is ipso facto an adjudication that each member of the firm is also a bankrupt. But there is no good reason supporting such contention, and a very strong reason against it."

Supplementing what the learned Judge has so forcibly stated, we may add that there is no doubt of the fact that the petition against the partnerships was against the partnerships alone, and that the individuals were not parties to this petition and that no process was had on them. Now the proposition is too fundamental to require the citation of authorities, that as the individuals were not parties to the partnership petition and no process was had on them, that the court could not pass upon or dispose of their rights in the individual property or the rights of their individual creditors. This position is made all the stronger if we bear in mind the admitted fact that there was no surplus from either estate.

That the petition against the partnerships was against them alone is conclusively established by two facts, namely, the following language in the opinion of the learned District Judge on page 68 of the record, when he says:

> "The refusal to adjudge the individuals composing the firm to be bankrupts was, if erroneous, an error which had to be appealed from within ten days from August 20th, 1920. (Section 25 B. A.)"

And, secondly, by the language used in the printed composition offered the partnership creditors, an extract

from which is found on page 31 of the record, where it is said:

> "No petition for bankruptcy has been filed by or against such individuals and no discharge of such individual debts so listed as individual debts is sought."

The Trustee is seeking to dissolve the Bank's judgment, and strange as it may seem, neither in his objections before the Referee, nor in his assignments of errors to the decision of the District Court, has he alleged insolvency or that the judgment was dissolved because it contravened any of the provisions of Section 67-c, or Section 67-f. For the convenience of the court we quote here a portion of each of these sections, so far as pertinent to the issue.

> 67-c. "A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt. (1) if it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy."

> 67-f. "That all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt."

The authorities in construing the above sections hold, without exception so far as we are advised, that the party

asserting that a judgment is dissolved by bankruptcy must affirmatively allege and bear the burden of proving that said judgment contravenes the above provisions of the bankruptcy act, and failure to do so is fatal and the judgment will stand.

The Supreme Court of Appeals of Virginia has recently decided this question in an able opinion in the case of Jackson v. Valley Tie Co., 108 Va., 718, where the court says:

> "The essential to the invalidity of any lien falling within the purview and control of the statute is, that (a) the lienee must be insolvent; (b) the insolvency must have existed at the time the lien attached—or, as applied in this case, Girard must have been insolvent on September 13, 1906, the date of the levy of the attachment.
>
> "Loveland on Bankruptcy (3rd ed.), Sec. 192c, discussing paragraph 67-f. of the bankruptcy act, says: **'It is essential to bring a case within the prohibition, that it appears that the lien was obtained against a person who was insolvent at the time. If it does not so appear, the lien is valid. It is not sufficient that the levy caused insolvency.'** See also I Remington on Bankruptcy, Sec. 1460.
>
> "In Simpson v. Van Etten (C. C.), 108 Fed 199, the opinion of the court quotes with approval from Collier's work on Bankruptcy (3rd ed), page 434, as follows. 'Not all liens obtained against one afterwards and within four months adjudged bankrupt are deemed null and void. **It must appear that the person whose property is subject to the lien was insolvent at the time of the creation of the lien.** It is evident a lien might be obtained against one who is adjudged bankrupt within four months thereafter, but who was not insolvent at the time the lien was obtained. The act of bankruptcy and the insolvency might have occurred

at some period subsequent to the creation of the lien. If so, the adjudication of bankruptcy would in no way determine whether or not the party was insolvent at the time the lien was created.'

"The burden of proof of such insolvency as is meant in paragraph 67-f. is held in Re Chappell, (D. C.) 113 Fed 5455, to be upon the party alleging it as ground for abatement. The syllabus in that case is as follows: 'Where the trustee of one who was adjudicated bankrupt on his voluntary petition files a petition alleging that certain partial payments to creditors made within four months of filing the bankrupt's petition, were made while he was insolvent, and praying that such creditors be required to return such preferential payments before being permitted to receive dividends on their claims, and the creditors answered that the bankrupt was not insolvent at the time such payments were made, no presumption arises from the adjudication in bankruptcy that the bankrupt was insolvent for four months, or any period, before his petition was filed and hence it is incumbent on the trustee to prove the insolvency.'

"In the case at bar appellant, neither in his petition filed in the lower court, nor in any statement of his grounds of motion to abate the attachment, relied upon Girard's insolvency within four months previous to his being adjudicated bankrupt, but relied solely on the ground that Girard had been adjudicated bankrupt within four months after the attachment in this case was executed, and that, accordingly, the attachment and the levy thereof were null and void, under and by reason of the provisions of the bankruptcy act, and especially paragraph 67-f. * * * * * Under these conditions, the judgment of the court overruling the motion to abate the attachment was plainly right."

This decision was cited with approval in Newberry Shoe Co. v. Collier, 111 Va., page 290.

In the light of these authorities we feel fully justified in concluding that the Trustee has made out no case which would justify this court in dissolving the Bank's judgment.

C

THE TRUSTEE'S POSITION IS STRANGELY INCONSISTENT AND CONTRADICTORY.

We desire to discuss under the same heading the assignments of error numbers (3) and (4) in the attached petition.

These assignments are that, "Said court erred in holding that the Bank's judgment against the individuals had been dissolved, when it was more than four months old at the time said individuals were adjudicated bankrupts," and that:

"Said court erred in holding that in the bankruptcy proceeding against the partnerships, it was legal to go against the individual assets of the partners when the record showed plainly that all individual assets would be required for individual debts, without any surplus, and vice versa."

We contend that the **Trustee of the individual estates cannot be heard to complain of the Bank's judgment,** because the judgment was more than four months old when the individuals were adjudicated, and whatever powers he has as such Trustee must be claimed under and through this adjudication. It is readily apparent, therefore, how contradictory and inconsistent the Trustee's position is, when he is forced to admit that the individuals for whom he is Trustee were not adjudicated bankrupts until more than four months after the rendition of the judgment which he attacks.

Nor can he as Trustee of the partnerships be heard to attack the Bank's judgment. A judgment against individual assets, where there is no surplus above individual debts, is not a preference as against partnership creditors. It is alleged, admitted, and the record so shows, that all individual assets will be required for individual debts. On page 34 of Record, Sec. 18, it is said:

> "The partnership assets will not be sufficient to pay the partnership creditors, and the individual assets will not be sufficient to pay the individual creditors, if there is included their personal endorsements on partnership indebtedness."

Section 5-f. of the Bankruptcy Act, so far as pertinent to the issue, is as follows:

> "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts."

Here are two trustees. The partnership trustee being directed to collect and distribute partnership assets to partnership creditors, and the trustee of the individual estates directed to collect individual assets and distribute to individual creditors. The partnership trustee was elected by partnership creditors, and the individual trustee by individual creditors. Suppose there had been separate trustees, and a contest had arisen as to their commission? Could it have been successfully contended that the partnership trustee could have administered the individual assets and deprived the individual trustee of his commission? It is manifest that he could not.

The trustee stands before this court seeking as trustee for the partnerships, and, by separate and distinct ap-

pointment, as trustee for the individuals, to have dissolved the Bank's judgment. Now the very dual attitude of the trustee is contradictory and inconsistent. If the bankruptcy of the partnerships carried with it the bankruptcy of the individuals, why didn't he, as trustee for the partnerships alone, object to the Bank's judgment? It is evident that he did not consider that his appointment as trustee for the partnerships conferred any authority over individual property; otherwise, he would not have accepted the separate appointment as trustee of the individual estates.

The trustee should be consistent. The dual manner in which he proceeds negatives any idea of individual assets having passed under his control upon the bankruptcy of the partnerships.

We conclude, therefore, that neither as Trustee of the individuals nor as Trustee of the partnerships can he consistently, legally or successfully attack the Bank's judgment.

(b) The Trustee again occupies an inconsistent position brought about by the learned Judge of the District Court declining to adjudicate the individuals in the partnership proceeding. The court was consistent in refusing to so adjudicate the individual partners, if for no other reason than that they were not parties to the petition against the partnerships, were not served with process, and had committed no act of bankruptcy. But there were other reasons which moved the Court to so decide, and in its opinion this striking language, so applicable to the point we are now urging, is used:

> "It only remains to be said that a party who seeks an advantage from a final and unappealable decree of court must rely on such decree as it is written or not rely on it at all."

The Trustee cannot claim under the order in one breath and against it in another. He cannot claim the

sweet and disregard the bitter. It is wholly inconsistent and contradictory for him to contend that the bankruptcy of the partnerships carried with it the bankruptcy of the individuals, when several months later the individuals were declared bankrupts on their voluntary petition and he was elected their Trustee in said proceeding. If the bankruptcy of the partnerships was ipso facto the bankruptcy of the individuals, then a vain and foolish thing was done when the individuals were adjudicated on their voluntary petitions, and the Trustee is a party thereto by accepting appointment as Trustee under such an adjudication of the individuals. Will this court presume that the learned District Court by its solemn order adjudicated the individuals to be bankrupt on their individual petitions when they were already in bankruptcy in that court?

To hold that the bankruptcy of these partnerships for making a general assignment ipso facto carried with it the bankruptcy of the individuals would be to lay down a principle, the evil effects of which would be most far reaching. To illustrate, Mr. Rockefeller might be one of a partnership of ten, and the partnership might make a general assignment and be thrown into bankruptcy in order to save costs and for equalization. According to the contention of the Trustee, Mr. Rockefeller would at once be a bankrupt, and all of his vast properties would pass under the control of the bankrupt court.

D

OTHER ERRORS COMPLAINED OF

The remaining assignments of error in the petition have necessarily been brought into the foregoing discussion, and, lest this brief assume too great a length, we will not now do more than allude to them.

The motion to dismiss and the demurrer, we respectfully submit, should have been sustained by the learned Judges of the Circuit Court, and we invoke a careful con-

sideration of these at the hands of this Honorable Court.

As to the assignment that the learned Judges of the Circuit Court erred in not sustaining the decision of the learned Judge of the District Court, when he held that his order in refusing to adjudicate the individuals bankrupts was res judicata, we respectfully submit that this assignment is well taken. In his opinion the learned Dustrict Judge says that he refused to adjudicate the individual partners to be bankrupt along with the partnerships, and that this order not having been appealed from within ten days, was final. The correctness of his conclusion seems unassailable. The Bank is asserting a judgment against the individuals, whom the District Court, by its order, has said were not bankrupts within four months, and this order is final.

Fortified by a final decree of the United States District Court, and a solemn judgment of a State Court, which has not been attacked, by proper allegations and proof that the individuals were insolvent at the date of the rendition of said judgment, or that there was reasonable cause to believe that they were insolvent, and that the judgment would work a preference against creditors of the same class, isn't the Bank's judgment unassaliable, and should not the decision of the District Court have been affirmed by the Circuit Court? We respectfully submit that it should.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED THAT THE PETITION SHOULD BE GRANTED AND A WRIT OF CERTIORARI ISSUED AS PRAYED FOR.

JAS. D. JOHNSTON,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1924

No. 234

LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, PETITIONER

vs.

JAMES A. BEAR, TRUSTEE IN BANKRUPTCY OF THE ESTATES OF W. L. BECKER, SR., and W. L. BECKER, JR., PARTNERS, ETC., AND AS TRUSTEE OF W. L. BECKER, SR., and W. L. BECKER, JR., BANKRUPTS, RESPONDENT.

On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF OF COUNSEL FOR RESPONDENTS.

Marvin J. Andrews—Publisher—Salem, Va.

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BRIEF OF COUNSEL FOR RESPONDENTS.

For the sake of convenience, we will in this brief designate the Petitioner as the Bank and the Respondent as the Trustee.

STATEMENT OF THE CASE

The proceedings had in this matter are chronologically stated at such length in the petition to superintend and revise (beginning at page one of record) and also in the sum-

mary of evidence (beginning at page twenty-two of record) that we deem it unnecessary in this statement to again set out in detail all of the facts and proceedings had in the matter, except to state that on July 20th, 1920, the Bank recovered in the Corporation Court for the City of Roanoke, Virginia, a judgment againt W. L. Becker and W. L. Becker, Jr., partners trading as the Roanoke Provision Company, and also against W. L. Becker and W. L. Becker, Jr., individually, which judgment was duly docketed on the 31st day of July, 1920, in the Clerk's Office of said Court. This judgment was for $5,566.05, with interest, attorneys fees and costs. The judgment was recovered on an ordinary homestead waiving note, made by W. L. Becker and the Roanoke Provision Company, and endorsed by W. L. Becker and W. L. Becker, Jr., individually, the Roanoke Provision Company being a partnership composed of W. L. Becker and W. L. Becker, Jr.

On August 6th, 1920 an involuntary petition in bankruptcy was filed in the Clerk's Office of the District Court of the United States for the Western District of Virginia, by Runkle & Company and others, against W. L. Becker and W. L. Becker, Jr., partners trading as W. L. Becker & Company and the Roanoke Provision Company, the petitioner alleging that an act of bankruptcy had been committed on August 4th, 1920, by the execution by the partnerships of a general Deed of Assignment to a Trustee for their creditors, the petitioner alleging that both partnerships were insolvent.

On August 7th, 1920, W. L. Becker and W. L. Becker, Jr., filed in said Clark's Office their joint answer to the petition, admitting its allegations, this answer being signed by them in their individual capacities, and in which they waived process and admitted all the allegations of the petition.

On August 20th, 1920, the partnerships of W. L. Becker & Company, and the Roanoke Provision Company were adjudged bankrupts and the case referred to R. Q. Mosby,

Referee, who directed the bankrupts to appear, and on August 23rd, 1920, entered an order reciting the adjudication of the partnerships an bankrupts and directing that they file the requisite schedule in partnership bankruptcy proceedings on or before the 2nd day of September, and also directing that they file, on or before said date, lists of their individual assets and liabilities, which schedules and lists were duly filed and which showed conclusively that both partnerships and the individuals composing them were insolvent beyond all question. (Record Pages 11, 12, 23 and 24).

Several meetings of the creditors were had and on September 25th, 1920, the partnership offered to their creditors a composition of 20 per cent. Various meetings of the creditors were had on this offer of composition, at which meetings a majority in number and amount of creditors accepted the offer of composition, but the Bank opposed it, counsel for the Bank at the meeting stating that the bank was opposed to the composition on the ground that the real estate owned by the individuals would be mortgaged in order to raise the money to pay the composition offered.

Further proceedings were had on this offer of composition from time to time until November 29th, 1920, on which date the partnerships amended their offer of composition. Various meetings of the creditors were then held from time to time to consider this amended offer of composition until finally at a meeting held December 23rd, 1920, a majority of creditors in number and amount voted favorably on the composition, but the Bank again renewed its objection on the same ground, and finally on January 3rd, filed in writing the same objection to the composition. Further proceedings were had in the matter from time to time before the referee, and finally the matter was heard before the District Court on April 20th, 1921, when said court entered an order sustaining the objections of the Bank to the composition, and rejecting the offer.

Since the offer of composition made by the partnerships had been acted upon unfavorably on April 27th, 1921, W. L. Becker, Sr., and W. L. Becker, Jr., filed their voluntary petitions in bankruptcy with the requisite schedules, and on April 28th, 1921, they were adjudged bankrupts individually.

On May 16th, 1921 respondent, James A. Bear was elected Trustee for the two partnerships and for W. L. Becker, Sr., and W. L. Becker, Jr., as individuals, and then proceeded with his administration of all four estates.

During these proceedings which had extended from August 6th, 1920, until April 27th, 1921, the bank filed two proofs of debt, the first on December 23rd, 1920, alleging that the Roanoke Provision Company was indebted to it in the sum of $5,566.99 with interest and certain attorneys fees, but that said bank had received no security for this debt. The second proof which was filed on January 6th, 1921, was also filed against the Roanoke Provision Company, alleging the same debt and alleging further that since the bank's judgment was against both the partnership and the individuals composing it, and was over four months old as to the individuals that the bank would claim that the judgment was a valid lien on the individual real estate of the partners. In addition to these two proofs on May 31st, 1921, the bank filed two proofs of claim, one against W. L. Backer, Sr., and another against W. L. Becker, Jr., alleging practically the same facts as were alleged in the proofs filed on January 6th, 1921, and in these two proofs again asserted that the judgment was over four months old as to the real estate of the individual partners, and was hence a secured claim. It will thus be observed that not until after four months had elapsed after the filing of the petition against the partnership did the bank by any pleading assert that this judgment was a prior or secured claim.

The Trustee sold the entire partnership assets, which only brought the sum of $908.08 (Record Page 11), this

amount being insufficient to pay even the costs of administration, and no dividend will be declared to the partnership creditors. The Trustee also sold the individual assets of W. L. Becker, Sr., bringing the sum of $11,786.00, from which a mortgage indebtedness of $2708.36 was paid; the assets of W. L. Backer, Jr., bringing the sum of $8832.00 from which a mortgage indebtedness of $3257.68 was paid, thus leaving $8077.64 payable to the individual creditors of W. L. Becker, Sr., and $5574.32 payable to the individual creditors of W. L. Becker, Jr., which after the payment of the costs of administration, will not be sufficient to pay their individual indebtedness. (Record page 11).

The case was heard before the referee on these various proofs of claim of the Bank and objections by the Trustee, (Record Page 2), to the allowance of the same as secured claims against the proceeds of sale of the real estate owned by the individual partners. On the issue thus raised on December 9th, 1921, the referee filed a written opinion (Record Page 38) and entered an order, (Record Page 45) declaring that said claims were disallowed as secured claims, but were allowed as unsecured claims. To this order of the referee the Bank prosecuted an appeal and petition for review to the District Court, who by an order entered May 23d, 1922 (Record Page 53) reversed the order of the referee and allowed the claims of the Bank as secured claims against the proceeds of sale of the real estate of the individual partners.

To this decision of the United States District Court the Trustee prosecuted an appeal to the United States Circuit Court of Appeals for the Fourth Circuit, who reversed the order of the District Court (Record Page 63). To the decision of the Circuit Court of Appeals, whose opinion is found at page 60 of the Record, this court awarded a writ of certiorari on which the cause is now before this Court.

BRIEF OF THE ARGUMENT.

I.

The filing of the petition against the partnerships and adjudication thereon carried into bankruptcy the members of the partnerships as individuals, because:

(a) The partnerships and the individual members were in fact insolvent.

(1) Petition against partnerships alleged insolvency (Record page 23).

(2) District Court adjudicated partnerships bankrupts (Record page 16).

(3) Partners admitted insolvency (Record page 23).

(4) Referee in summary of evidence found that neither the assets of partnerships nor of the individuals sufficient to pay their debts (Record page 26, paragraph 18).

(5) Pleadings filed by Bank admitted insolvency (Record pages 19, 47, 49 and 50).

(6) Stipulation of counsel as to contents of lists filed by individuals partners shows insolvency (Record page 11).

(b) The adjudication of the partnership was in effect an adjudication of the individual members.

Section 5 of the Bankruptcy Act,
General Order in Bankruptcy No. 8,
Francis v. McNeal, 228 U. S. 695; 57 Led. 1029,
In re: Meyers, 98 Fed. 976,
Dickas v. Barnes, 140 Fed. 849,
Vacarro v. Security Bank, 103 Fed. 436.

II.

The assets of the individual partners being drawn into

bankruptcy by the adjudication of the firm, Congress intended that such assets be distributed in acordance with the principles and rules of the Bankruptcy Act which prevent the perfection of liens thereon, preferences, or an inequitable marshalling of the partnership and individual estates, which is shown by:

(a) The privisions of the Act and its construction by the Federal Courts,

Section 5 of the Bankruptcy Act, Clauses b through g, In re: Meyer, 98 Fed. 976,

Dickas v. Barnes, 140 Fed. 849

Black on Bankruptcy (1922 Ed.), page 110

Francis v. McNeal (3rd Circuit), 186 Fed. 481

Vacarro v. Security Bank, 103 Fed. 436.

(b) The construction placed upon the Act by this Court.

Francis v. McNeal, 228 U. S. 695; 57 Led. 1029

Miller v. New Orleans Acid Fertilizer Co., 221 U. S. 496

General Order in Bankruptcy No. 8.

III.

Litigation was pending over the composition offered by the partnership and pending decision of this question no liens could be perfected against property of the individual estates which would prevent an equitable distribution of the property of the several estates. (Record pages 24 and 25).

IV.

The assignments of error should be overruled.

(a) The first assignment of error is without merit for the reasons stated under Section I, II and III of the Brief of the Argument.

(b) The second assignment of error is without merit for the reasons states under Sections I, II and III of the Brief of the Argument and for the further reason that Sections 67 c and 67 f of the Bankruptcy Act are to be considered in connection with the other provisions of the Act.

(c) The third, fourth, fifth, sixth and seventh assignments are without merit for the reasons states under Sections I, II and III of the Brief of the Argument and for the further reasons:

(1) The Trustee in this case is the representative of the four estates which are now in bankruptcy (Record page 26, paragraph 4).

(2) There are other creditors of the individuals estates who have the right to object to the Bank's claim being a secured claim, even if it be assumed that the Bank is classified as an individual creditor. (Record page 26, paragraph 18, Record page 11).

ARGUMENT.

Briefly the contention of the Bank in this case is that its judgment which was recovered both against the partnership and the individuals composing it, and which was docketed in the proper State Clerk's Office on July 31st, 1920, is a lien on the property of the individuals, because said individuals were not adjudicated bankrupts until April 28th, 1921, some eight months later. The Bank taking the position that a partnership is a legal entity distinct from the individuals composing it, and that the adjudication of the firm as a bankrupt had no effect upon liens acquired on the properties of the individual partners.

On the other hand, the Truestee contends that the partnership composed of exactly the same individuals having been adjudicated a bankrupt on August 20th, 1920 (less than one month from the docketing of the Bank's judgment) that this adjudication of the partnership brought the es-

tates of the individuals composing it under the jurisdiction of the bankruptcy court to such an extent that no liens could be perfected thereon.

The foregoing respective contentions of the parties are for the Trustee summarized in the Brief of Argument, while those of the Bank are contained in 7 assignments of error appearing on pages 6 and 7 of the petition for certiorari. Since, however, the questions presented by the Brief of Argument and the assignments of error are so closely related, we believe it will be conductive to clearness and certainly brevity to discuss the assignments of error along with the reasons advanced by us for the affirmance of the decision of the learned Circuit Court.

I.

THE PARTNERSHIP AND ITS MEMBERS WERE IN FACT INSOLVENT.

In the case at bar the petition in bankruptcy against the partnerships alleged that they were insolvent. All the members of the partnership on the following day filed their answer and **admitted** the allegations of the petitions. (Summary of evidence, paragraphs 2 and 3, Record page 23).

Twenty-one days thereafter the District Court **adjudicated** the partnerships bankrupt. In addition to this specific allegation of insolvency appearing in the petition, the admitted fact in the answer filed to the petition and the adjudication which was made on the petition and answer (which we contend conclusively established the existence of an act of bankruptcy involving insolvency) there is in the record other abundant evidence of the fact that the partnerships were insolvent. The Referee in the summary of evidence (Paragraph 18, Record page 26) found that the partnership assets will not be sufficient to pay the partnership debts and the individual assets will not be sufficient to pay the individual creditors if there is included their per-

sonal endorsements on partnership indebtedness. Counsel for the Bank has admitted the same facts. In his petition for appeal from the decision of the Referee (Record page 47) it is alleged that "when the bankrupts knew that it would take more than all of their individual assets to pay their individual creditors." Again in the petition for review of the order of the Referee (Record page 49) counsel for the Bank allege that "the petitioner says that the entire individual assets will not be sufficient to pay the individual creditors and that there will be no surplus from the individual assets to be distributed among the partnership creditors." In the same pleading, in speaking of the composition, counsel alleges: "When the bankrupts knew that it would take more than all of their individual assets to pay their individual creditors." To the same effect are the allegations of the sworn, separate proofs of debt filed against W. L. Becker, Sr., and W. L. Becker, Jr., which are the allegations on which the Bank is now seeking a recovery and which specifically allege that the entire individual assets of W. L. Becker, Sr., and W. L. Becker, Jr., will be required to pay their individual debts and there will be no surplus of said individual assets to be applied to partnership debts. Furthermore, the absolute insolvency both of the partnerships and the individual members thereof is clerly established by the other evidence appearing in the record, especially the stipulation found at page 11.

Notwithstanding the fact, however, that we submit that the record in the case shows clearly that the insolvency of both the partnerships and their members, it will be borne in mind that in neither the proceedings before the Referee, nor before the District Court was this question of insolvency raised. Not until Counsel for the Bank filed in the District Court his motion to dismiss the appeal granted to that Court was this question of insolvency raised and we submit that the question not having been raised until the record had been made up and filed in the Circuit Court, that now the objection comes too late and cannot now be heard.

The adjudication in this case having been upon an act of bankruptcy where the elements of insolvency were present, it follows that:

THE ADJUDICATION OF THE PARTNERSHIP WAS IN EFFECT AN ADJUDICATION OF THE INDIVIDUAL MEMBERS.

(1) The Bankruptcy Act, Section 5, Clause B, through G, provides how both individual and partnership estates are to be administered for the benefit of the creditors.

Clause G provides that:

> "The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all of the partners and of the administration of the partnership and individual property."

Clause F provides that:

> "The net proceeds of the partnership property shall be appropriated to the payment of partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts; should any surplus remain of the property of any partner after paying his individual debts such surplus shall be added to the partnership assets and be applied to the payment of partnership debts."

Clause G provides that:

> "The court may permit the proof of the claim of the partnership estate against the individual estates and vice versa, **and may marshal the assets of the partnership estates and individual assets so as to prevent preferences and secure the equitable distribution of the property of the several estates." (Bold face type ours).**

The intention of Congress by the enactment of Section 5, Clause B through G was to afford facilities for the equit-

able distribution of the several estates and to this end it granted to the Supreme Court of the United States the right to prescribe a procedure in bankruptcy. The Supreme Court in General Order No. 8 provides:

> "Such partner shall be required to file a schedule of his debts and inventory of his property in the same manner as is required by the Act in cases of debtors against whom adjudication of bankruptcy shall be made."

In this case the referee followed the conventional procedure. Record Page 17). He directed that the two partners, who alone composed the partnership should file lists of their respective assets and liabilities. This the partners did on August....., 1920, (Record Page 23) and from that moment, with their consent, their estates were under the jurisdiction of the bankruptcy court for distribution of their properties among the several classes of creditors.

The intention of the bankruptcy act was not to create new rights between the partners and their creditors, but was to so marshal and so administer the several estates in bankruptcy as would leave intact the common law rights of all parties concerned. As was said in the case of In re: Meyer, 98 Fed. 976:

> "By the provisions of Section 5 of the bankruptcy act a partnership during the continuance of its business or after its dissolution and before final settlement of its business may be adjudged a bankrupt and jurisdiction of all the partners and the administration of the partnership and individual property is conferred upon any court of bankruptcy having jurisdiction of one of the partners."
>
> 'We are of the opinion that it is the scheme of these provisions to treat the partnership as an entity,

which may be adjudged a bankrupt by voluntary or involuntary proceedings, irrespective of any adjudication of the individual partners as bankrupt, and upon an edjudication to draw to the administration the individual estates of the partners as well as the partnership estate, and marshal and distribute them according to equity."

To the same effect is the case of In re: Stokes, 106 Fed. 312, which holds under the Bankruptcy Act of 1898, Section 5:

"The adjudication of a partnership as a bankrupt draws to the court of bankruptcy for administration the individual estates of the partners though they are not adjudged bankrupts individually and such court may require an assignee for the benefit of creditors of one of the partners to surrender the assigned property to the Trustee of the partnership by a summary order, since such assignee does not hold adversely but in the right of his assignor."

In the case of Dickas vs. Barnes, 140 Fed. 849, certain members of a partnership objected to the court taking charge of their estates on the ground that they were wage earners and farmers and not subject to proceedings in bankruptcy. The court, however, held that one who becomes a member of a partnership may become subject to the exercise of the powers **of a court of bankruptcy where the resources of the partnership will be gathered to satisfy the claims of the creditors.** That these are **consequences of the partnership relation,** and are not derived from the bankruptcy act. That if bankruptcy does not supervene the rights of the parties will be worked out by a court of general jurisdiction and the partner would be a party, a **necessary party to the record** so that his liability for the firm debts could be enforced, and that in the bankruptcy court he may be brought before the court for the same purpose. See also Black on Bankruptcy, (1922 Edition), Section 110.

(2) **This court has so construed the Act.** This court in the case of Fancis vs. McNeal, 228 U. S. 695; 57 L. Ed., Page 1029, where the issue raised was whether Francis was a partner in the firm which was a bankruptcy. Pending the determination of this question the court entered an order confirming a certain agreement entered into between the parties, whereby Scott, Counsel for Francis, would collect certain rents on his (Francis') individual property and hold the same subject to future determination of this question. Later the Referee found Francis to be a partner and McNeal, who had been appointed Trustee, filed a petition asking leave to take over the individual property of Francis, which upon a hearing was so ordered by the Referee. Later the court affirmed the order of the Referee directing the Trustee to take over Francis' individual property and later Mr. Justice Holmes again affirmed the decision of the lower court and after stating the facts, held:

(1) That the liability of a partner for partnership debts was primary and direct and not collateral, as that of a surety, regardless of whatever priority there may be in marshalling their assets. That this liability is created by the common law, regardless of the Bankruptcy Act.

(2) That ordinarily a partnership cannot be insolvent with one of its members solvent and that the banqruptcy law has not established principles inconsistent with this rule. On the contrary that Section 5, Clausese a through g contemplate that **both partnership and individual estates are to be administered in bankruptcy and this is true, notwithstanding the fact that** for some purposes these Clauses recognize the entity theory. That the only exception contemplated by the Bankruptcy Act is Clause "h" of Section 5, will allow a solvent partner of a firm where some, but **not** all, are in bankruptcy to administer the estate, and this clause does not import that the partnership can be in bankruptcy and some of the partners out. That the necessary and natural meaning of this language goes no further.

(3) That if the partnership and individual estates together are not enough to pay the partnership debts, the rational and certainly not forbidden thing to do is to administer the min bankruptcy.

(4) That so far as Vaccaro vs. Secnity Bank, 103 Fed. 436, is in conflict with the majority decision in re Bretanshaw 157 Fed. 363, that it (meaning the Vaccaro case) is sustained by the stronger reasons and is correct.

We have cited and have stated what we consider this case to hold for the purpose of showing that the Supreme Court of the United States has not carried the entitiy theory to the extent which the District Court has carried it, and we submit that this case clearly holds that Clauses 'a' through 'g' of Section 5, clearly contemplte that both estates must be administered in bankruptcy and the natural coisequence of this rule necessitates that upon the filing of a petition in bankruptcy against a partnership, in the very nature of things, and in order to properly marshal the assets and liabilities of the two estates, the individual property must be taken into bankruptcy and held by this court free from any one obtaining liens against it which would prevent the marshalling of assets and result in a preference. In fact, as we read this devision, it holds that it is impossible in the nature of things for the partnership to be in bankruptcy with its partners solvent, and the only time that the entity theory applies is in a cese where there is a solvent partner, who may then by authority granted him under the Act, administer the estate. If there is a solvent partner, as is pointed out in this case, the firm is not insolvent, and there is really no occasion for bankruptcy for as Mr. Justice Holmes says at Page 1030:

> "A judgment could be got and the partnership debt satisfied on execution out of the individual estates."

In fact we are unable to conceive of a case where a partnership could be insolvent if its members, or any one of

them, are solvent, which the learned Circuit Court and this Honorable Court have so decided.

To meet this decision of this Honorable Court the Bank contends that the decision of this court in Francis vs. McNeal, 228 U. S. 695; 57 L. Ed. 1029, is not applicable to this case, because the decision of the same cese in the United States Circuit Court of Appeals for the 3rd Circuit, 186 Fed. 481; 26 American Bankruptcy Reports 560, proceeded upon the theory that in that case the court was dealing with a situation where the partnership had been adjudicated upon a petition involving insolvency; that in the case at bar the adjudication of the partnership did not involve insolvency because it was upon a general deed of assignment, great stress being laid on the fact that in the case at bar the adjudication of the partnerships was based on the fact that they had executed a general deed of issignment. In other words, the contention is that the decision of the Circuit Court of Appeals in Francis vs. McNeal was based upon an adjudication involving insolvency, but that in the case at bar the adjudication of the partnerships did not involve such question; hence the decision of neither the Circuit Court nor this court in Francis vs. McNeal applies.

In Francis vs. McNeal the cause was heard upon the petition of the Trustee and the order directing Francis to deliver his property to the Trustee, the answer of Francis and the opinion of the Circuit Court. The Trustee's petition averred that a creditors petition had been filed against the partnership and all its members, alleging that they were bankrupts individually and as a firm, and praying that they may be so adjudicated. That said creditors petition was filed was admitted by the answer of Francis, and the court at page 482 of 186 Federal Reporter, said:

> "Consequently we must assume that the act of bankruptcy upon which the adjudication against the partnership was made was one involving insolvency of the partnership."

It appears therefore that the facts in the instant case and in Francis vs. McNeal afford striking similarity and that although the case at bar, as was in the case of Francis vs. McNeal, the act of bankruptcy alleged was on the execution of a general deed of assignment, it is clearly shown by the record in this cause that the act of bankruptcy was one where all the elements of insolvency were present and was one involving insolvency. It appears to us, therefore, there can be no distinction between the two cases.

The argument next advanced by the Bank is that there can be no bankruptcy of a partnership for insolvency unless it is alleged and proven that the individuals as well as the partnerships were insolvent, that there can be no adjudication of the partnerships without an adjudication of the individuals, who cannot be adjudicated unless they were before the court, as they were not in the instant case. As we interpret this argument, the contention is that they could be no adjudication of a partnership in bankruptcy unless at the time of the adjudication of the partnership it appeared by an inquiry instituted for that purpose that the individuals were also insolvent. In other words, unless a petition were pending against the individuals composing the partnership, process was served on them and by such inquiry it were determined that their assets were not sufficient to meet their liabilities, then no adjudication could be had against the partnership. In this argument, however, counsel compjletely overlooks the unquestioned principle that the partners are liable **in solido** for the debts of the firm and that the adjudication of the firm as bankrupt is bound in the nature of things to be an adjudication of the individual partners as insolvent. If the partnership was insodvent, the members were bound to be. That was the very point in Francis vs. McNeal. There the firm and some of its members had been adjudicated, but Francis had not been, and the question arose, did he have to turn over his individual property to the Trustee. The court held that he did and in summarizing its decision stated that in involun-

tary proceedings where the act of bankruptcy charged is one involving insolvency of the partnership, there can be no adjudication against the partnership unless it and all of its members are insolvent, and that in such a case, though the adjudication be against the partnership **only**, or against the partnership **and some, but not all**, of its numbers, the assets of **all** members are drawn into the proceedings for administration.

As the learned Judges of the Circuit Court in their opinion in this case (Record page 61) have well said:

> "It is imposible for a partnership to be insolvent when the partners individually, or any one of them, is solvent, because every partner is individually liable for the debts of the partnership. A proceeding in equity to marshal assets of a partnership would necessarily be dismissed upon a showing that the complaining creditor could collect his debt in an action at law from one of the partners. Under a creditors bill in a court of equity against a partnership every creditor of the partnership has the right to prove his claim against the individual members of the firm and have it paid from the individual assets, if there be a sufficient surplus over the individual liabilities. Pomeroy Equity Juris. (4th Ed.), Sections 2371, 2372."

A further distinction between these cases is attempted to be made in that in the instant case none of the partners were adjudged bankrupts, while in Francis vs. McNeal some of them were. There is, however, no real distinction. It is true that in the instant case the District Court did refuse to adjudicate any of the individuals, but its decision was based upon a narrow construction of the act to the effect that a partnership was an entity for all purposes, while in Francis vs. McNeal both in the District Court and in this Court the real issue was whether the bankruptcy of the firm was in effect an adjudication of Francis, or at least brought his property before the court. The Circuit Court and this

Court so held that the adjudication of the firm brought in the individual property of Francis, because the petition was against the firm and hence against all of its members, but no distinction was made in either court because Francis, whose estate was involved, was not adjudicated upon the original petition, the sole question being the binding effect of the adjudication against the **partnership** and **some, but not all, of its members**, it appearing that the question of insolvency was involved. It is true that in Francis vs. McNeal there was no issue as to the validity of a lien, as in the instant case, but the underlying reason for the basic principle was present; that the members of the firm and their property were in bankruptcy, subject to the rules of administration in bankruptcy.

II.

THE ASSETS OF THE INDIVIDUALS BEING DRAWN INTO BANKRUPTCY BY THE BANKRUPTCY OF FIRM, THEY WILL BE ADMINISTERED AS THE ACT REQUIRES.

If then, Francis vs. McNeal, supra, and the other cases just cited are authority for the propsition that it was the intention of Congress to bring both estates before the bankruptcy court and certainly such was the construction of the act by Mr. Justice Holmes in Francis vs. McNeal, supra, then surely it expected the estates to be administered in accordance with the provisions of the Bankruptcy Act, and not in accordance with some foreign principle or fiction of the law to the effect that a partnership is an entity distinct from the members which compose it, at least, this we submit would be the natural inference in the absence of an express enactment.

But there is an express enactment. Clause "F" provides how how the net proceeds of the property of a partnership and individuals shall be divided among their respective creditors and Clause "G" provides that:

"The Court may permit the proof of the claim of the partnership estate against the individual estates and vice versa, **and may marshal the assets of the partnership estate and individual assets so as to prevent preferences and secure the equitable distribution of the property of the several estates." (Bold face type ours).**

The stated intention of this clause is to secure an equitable distribution and prevent preferences. They must be construed so as to carry into effect the purposes of the Act, and this contention is sustained by this Court in the case of **Miller vs. New Orleans Acid & Fertilizer Co., 221 U. S. 496.**

In that case a member of a partnership had conveyed certain of his property to the defendant Miller in settlement of a debt which Miller hald against him. Under the State Law of Louisana this constituted a preference which could be attacked by both partnership and individual creditors. Certain partnership creditors filed a bill under the State Law which gave them a lien upon the funds so recovered. More than four months after the debt had been paid, but within four months of the institution of the suit to set it aside, the partnership was adjudged a bankrupt, but the individual members were not so adjudged. On his motion as allowed by Section 67-F of the Bankruptcy Act the Trustee intervened in the suit in the State Court as plaintiff in place of the creditors and proceeded with the suit claiming the right to recover the fund, and enforce the lien.

The highest court of Louisana having held the payment to be a preference under the State Law Miller applied for, and obtained a writ of error to this Court. In this Court the question was raised whether the partnership members could complain of the payment in full of a partner's individual debt out of his individual estate since under the method of administration provided by the Act the individual creditors must be paid in full before any of the individual estate could be applied to the partnership debts. The Court held:

(1) That notwithstanding the fact that under the Law of Louisana partnership creditors shared with individual creditors in the distribution of the individual estate of the partnership this rule was superseded by the adjudication of the firm bankrupt, and the bankruptcy act was controlling on this question.

(2) That the Trustee was entitled to recover the fund for the benefit of other individual creditors if there should be any, and that the method of distribution of this fund among the individual creditors was a question solely for the bankruptcy court to determine.

(3) But that if it appear in the proof of the claim against the individual estate that Miller is the only individual creditor, he will be entitled by way of distribution to the full amount paid in by him **because of the method of administration ordained by the Bankruptcy Act.**

This case seems to hold that the lien of the three partnership creditors on the fund was avoided upon the filing of the bankruptcy petition against the partnership within four months, although it was not shown that other partnership creditors would be prejudiced, and that if a partnership creditor obtains a lien upon the estate of an individual partner within the four months, that this lien is a preference if it interferes in any way with the **manner and method of distribution fixed by the Act.**

If then we are correct in our contention that the Act confers jurisdiction over both estates as an initial proposition, and either expressly or impliedly provides the method of distribution then it undubitably follows that it was not the intention of Congress to allow aliens to be perfected during the pendency of the proceedings.

III.

LITIGATION PENDING.

The record shows consclusively that from the time of

the filing of the partnership petition, and the filing of the list of assets and liabilities of the individual partners that all of the creditors regarded both estates as before the court for settlement. The partners themselves so regarded it as they submitted to the jurisdiction of the court, and filed lists of their assets and creditors which showed them to be insolvent. They then filed an offer of composition. This they had the right to do under the provisions of the Act. The creditors had the right to determine whether they would accept the composition. The formalities of the bankruptcy law as to the offer and acceptance of the compromise had to be complied with. Both the bankrupts and the creditors of both estates had the right under the provisions of the law to conduct these proceedings in a legal and orderly manner without liens being perfected during the pendency of the proceedings. Naturally these proceedings required time, and both the partners and the creditors of both estates entered into this litigation over this question in good faith, believing that both estates were before the court, and that they had time to dispose of the question in the manner prescribed by law.

The first offer of composition was filed on September 25th, 1920, and was considered at a number of meetings of the creditors from time to time until November 29th, 1920, at which date an amended offer of composition was made, and this was then considered from time to time and was before the referee, and the District Court until the 20th day of April, 1921, thus the time from September 25th, 1920, until April 20th, 1921, the period of time in which the Bank's judgment became four months old was consumed by active litigation and there were no indications until January 6th, 1921, that the Bank would claim a lien upon the individual assets. It is true that Counsel for the Bank stated that he objected to the individual assets being mortgaged to raise money with which to pay the partnership creditors, but not until this pleading of January 6, 1921, was filed were the other creditors advised that the Bank did not

regard the individual assets as being before the Court. Clause "G" provides that the Court may marshal the assets so as to secure an equitable distribution. If under these facts and circumstances the Bank is allowed to prevail, the provisons of Clause "G" will be entirely ignored and there will not be an equitable distribution. Especially is this true in view of the fact that although the debt which is now being asserted by the Bank was reduced to judgment both against the firm and the partners, it is in fact a partnership debt. The Referee found that all or substantially all of the money which was advanced on the notes given to the Bank, and upon which it obtained its judgment was expended and used for partnership purposes; that very little, if any, of the money was used for individual purposes of the partners. (Record Page 26). This finding of the Referee is presumptively correct. Collier on Bankruptcy, 12th Edition, page 699, and cases cited.

The partnership assets will not be sufficient to pay the partnership creditors, nor will the individual assets be sufficient to pay the individual creditors. (Record Page 26). In fact, the entire sale of the partnership assets brought only the sum of $908.08 (Record page 11), which will hardly pay the costs of administration, must less the many thousands of dollars which the partnership owes.

The lists of assets and liabilities of W. L. Becker, Sr., show that he is individually indebted as an endorser and otherwise in the sum of approximately $30,666.94 and that after the sale of all his individual property, and the payment of the mortgage indebtedness thereon, only $9,077.64 will be available for distribution to his individual creditors. The list of W. L. Becker, Jr., show that he is indebted as an endorser and otherwise in approximately the sum of $30,336.-12, while the sale of his individual assets after the payment of the mortgage indebtedness thereon will leave available for distribution among his individual creditors only the sum of approximately $5,556.32. Thus as the situation now stands after the payment of the costs of administration less

than $14,000.00 will be available for distribution among the individual creditors, and nothing will be available for distribution among the partnership creditors. (Record Page 11).

Under these conditions we submit that if the claimant is allowed to recover from the proceeds of sale of the individual estates every dollar of a debt which is in fact a partnership debt there will be no **equitable marshalling** of the several estates, but in fact a most **inequitable hardship** will be imposed upon the other individual creditors of the individual partners. The act is dual in its operation. On the one hand it operates **in rem** providing for the distribution of the **estates according to well defined principles.** On the other hand it operates **in personam** granting persons adjudged bankrupts a discharge from their debts if they comply with the law in reference to discharge. In this case the question before the Court is not one of discharge, but a question of the proper distribution of the **estates,** and if as we contend the estates of the individuals are brought into the bankruptcy court for distribution, then we submit that the Trustee's title to the individual estates relates back to the filing of the partnership petition, and as the Bank's judgment was recovered within four months of that time the lien thereof is annulled.

IV.

THE ASSIGNMENTS OF ERROR SHOULD BE OVERRULED.

We have heretofore already discussed to a certain extent these assignments of error and the argument of counsel for the Bank thereunder in our discussion of the general principles applicable to the case and while we do not think the situation merits a further general discussion of assignment No. 1, we do desire to state briefly our views of some

of the contentions made under the remaining assignments of error.

(b) Sections 67 "c" and 67 "f" are to be considered and construed in connection with the other provisions of the Bankruptcy Act.

The argument of Counsel for the Bank in connection with these two sections of the Bankruptcy Act is to the effect that the Trustee has not alleged insolvency or that the judgment was dissolved because it contravened any of the provisions of these Sections, quoting them and citing authorities to the effect that the party asserting that a judgment is dissolved by bankruptcy must affirmatively allege and bear the burden of proving that the judgment contravenes these two provisions of the Act, and failure to so allege and prove insolvency renders the judgment unassailable.

Having fully discussed the condition of the record on the allegations and proof of insolvency, we will not discuss these questions further, but we submit that these two sections do not have the application to the case that Counsel for the Bank contends. We have found no authority and certainly Counsel for the Bank have cited none which would indicate that it was the intention of Congress to give greater efficacy to these two sections than to any other section of the act. We do not think that Congress intended that the validity of liens in connection with partnership bankruptcies should be solely controlled by these two sections and that Section 5, clauses "b" through "g," should be ignored or made subservient to Sections 67 "c" and 67 "f", especially when Section 5 deals directly with partnership bankruptcies.

As we have heretofore contended, we believe that insolvency has been abundantly alleged and proven, but irrespective of the proper solution of that question the contention of the Bank disregards the fact that the petition against the partnership was filed within four months from

the recovery of the judgment, the effect of which we have argued at length and which, we earnestly contend, renders the estates of the partners subject to administration in bankruptcy in accordance with the cardinal principles of the act and in accordance with the provisions of Section 5, Clauses "b" through "g."

C

THE TRUSTEE REPRESENTS ALL FOUR ESTATES

(1) Counsel for the Bank contends that the Trustee of the individual assets cannot be heard to complain of the Bank's judgment because the same was more than four months old when the individuals were adjudicated, and whatever power he has as such Trustee must be claimed under and through this adjudication. The court will bear in mind that the record shows that due to the fact that litigation was pending over the composition offer, no Trustee was elected for the partnerships until after the adjudication of the individual partners, whereupon at the first cerditors meeting after the District Court had rejected the offer of composition respondent was elected Trustee of the estates of both partnerships and as Trustee of the individual estate of W. L. Becker, Sr., and that of W. L. Becker, Jr. Hence when the Trustee objected to the allowance of the Bank's claim as a secured claim, he objected both in the capacity of Trustee for the partnerships and as Trustee for the individuals, and it is for the protection and in the interest of an equitable distribution of all four estates, free from preferences, that he conducts this litigation. We are unable to see any force in the centention that the Trustee is claiming through the adjudication of the individual estates, because as a matter of fact, he claims as the representative of all four estates and there is nothing inconsistent in his attempts to have the assets of all four estates marshalled so as to prevent preferences and to secure an equitable distribution of the property of the several estates, and this is true

regardless of the fact that the judgment was four months old when the individuals were adjudicated, the effect of which we have already discussed at length.

C

THERE ARE OTHER CREDITORS OF THE INDIVIDUAL ESTATES WHO OBJECT TO THE BANK'S CLAIM.

(2) The next contention advanced is that the Trustee of the partnerships cannot be heard to attack the Bank's judgment against the individual assets where there is no surplus above the individual debts and the same is not a preference as against partnership creditors. This same contention is advanced under the first assignment of error on page 17 of the brief and with apparently no regard for logical sequence appears at various places throughout his brief. We will now discuss this contention as it appears under this assignment of error and elsewhere in the brief of counsel for the Bank.

It will be remembered that in this case the debts scheduled by the individual members are classified as follows:

1st class debts for which W. L. Becker, Sr., was alone liable	$ 5,372.00
Debts for which W. L. Becker, Jr., was alone liable	6,527.85
2nd class debts for which both were liable with other makers and endorsers	3,900.00
3rd class debts for which both were liable as endorsers for the partnership	27,066.00
Total debts on which there is individual liability	$42,865.85

The debts of the first class aggregate $11,899.85; those of the second and third classes aggregating $30,966.00. The

sale of all the individual assets of both partners brought $20,618.00, from which a total prior uncontested mortgage indebtedness of $5,966.04 was paid, leaving for destribution $14,651.96. The total debts of either class plus the bank's judgment of $5,566.05, aggregate more than the total amount available for distribution, and in making the foregoing calculation, the cost of administration and the many thousands of dollars of purely partnership demands are not taken into account. Nor is the sum of $508.08 which was all that was realized from the sale of the partnership assets. The Referee found that the debt of the bank on which the judgment in question was rendered was incurred for partnership purposes, but regardles of this, or in which class the bank's debt is placed, it is evident that in any event, there will not be an amount sufficient to pay any creditor in full. Thus the solution of the question in this case favorably to the contention of the Trustee is of vital importance to all of the creditors, those holding purely personal demands, as well as those holding the notes of the partnership endorsed by the individual members, and that the bank's judgment in fact results as a preference against both classes of creditors.

The illustration attempted by counsel for the bank, on page 27 of his brief, as to the unfortunate position in which Mr. Rockefeller would be placed if some partnership of ten of which he were a member, would for reason sufficient unto themselves execute a deed of assignment and be thrown into bankruptcy, is not applicable. In such contingency, if Mr. Rockefeller were solvent he would merely exercise his right as a solvent partner to administer the affairs of the partnership. On the other hand, if the partnership were insolvent, the rule in Frances vs. McNeal, supra, would apply, and Mr. Rockefeller would himself be insolvent, and his affairs would be thrown into bankruptcy to be administered in accordance with the provisions of the Act.

CONCLUSION.

In conclusion, it is respectfully submitted:

(1) That the record in this case shows that the partnership and its members were insolvent; that regardless of this question, no such issue was raised by the claimant Bank before the Referee, or the District Court, and that now such contention will not be heard in this Court.

(2) That the filing of the petition against the partnership and the adjudication thereon was in effect an adjudication of the individual members, or at least carried their assets into bankruptcy. That the assets of the individual members being in bankruptcy, it was the intention of Congress as interpreted by this Court in Frances vs. McNeal, supra, that the assets of both estates be distributed in accordance with the method of distribution ordained by the Bankruptcy Act, so as to prevent preferences and to secure an equitable distribution of the different estates among the respective creditors.

(3) That this being the proper interpretation of the Act, it was the intention of Congress that its provisions should be carried into effect in such manner as to allow the Court to administer the properties of the various estates untrammeled by litigation or proceedings which would result in the perfection of liens against either estate.

(4) That none of the errors assigned by the Bank or the argument of counsel thereon state any valid reasons why the decision of the learned Circuit Court is not proper.

It is therefore respectfully submitted that the decision of the United States Circuit Court of Appeals for the Fourth Circuit should be affirmed.

G. A. WINGFIELD,
Counsel for Respondents.

JAMES A. BEAR,
HARVEY B. APPERSON,
of Counsel for Respondents.